

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

PENROD MANAGEMENT GROUP,

Civil Action No.: 07-CV-10649

Plaintiff-Petitioner,

- against -

STEWART'S MOBILE CONCEPTS, LTD.,

Defendant-Respondent.

---

**DECLARATION OF CHRISTINE TRAMONTANO  
IN SUPPORT OF PENROD MANAGEMENT GROUP INC.'s MOTION IN LIMINE**

CHRISTINE TRAMONTANO declares, under penalty of perjury, as follows:

1. I am associated with the law firm of Holland & Knight LLP, attorneys for Plaintiff-Petitioner Penrod Management Group, Inc. ("PMG"). I am fully familiar with the facts and circumstances of this action.

2. This declaration is submitted in support of PMG's motion *in limine* to (1) quash Defendant-Respondent Stewart Mobile Concepts, Ltd.'s ("SMC") trial subpoena *ad testificandum* dated May 16, 2008 (the "Trial Subpoena") directed to Jack Penrod and (2) to preclude the admission of the Direct Examination Affidavit of Bob Hiss, the Accounts Receivable Manager for non-party Mr. John, Inc., sworn to on May 5, 2008.

3. On November 28, 2007, PMG commenced this action pursuant to Fed. R. Civ. Pro. 65 to enjoin arbitration proceedings that SMC initiated against PMG and non-party Nikki Beach Atlantic City, LLC ("NBAC") before the American Arbitration Association pursuant to an arbitration clause contained in an agreement between SMC and PMG. Annexed hereto as Exhibit A is a true and correct copy of the Petition filed in this action.

4. SMC argued that PMG should be compelled to arbitrate, based on its theory that PMG is the alter-ego of NBAC. On February 16, 2008, this Court granted PMG's motion to stay the arbitration pending this Court's determination of whether PMG is the alter-ego of NBAC. Annexed hereto as Exhibit B is a true and correct copy of this Court's Opinion and Order dated February 16, 2008. As such, the sole issue to be resolved at trial is whether PMG is the alter-ego of NBAC.

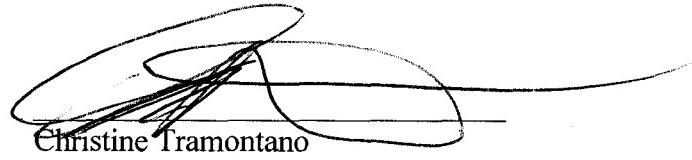
5. PMG has offered in evidence the testimony of John Michael Register, the individual who has the most direct knowledge concerning the facts relevant to SMC's alter-ego allegations. Annexed hereto as Exhibit C is a true and correct copy of the Direct Examination Declaration of John Michael Register.

6. In support of its claim that PMG is the alter-ego of Nikki Beach Atlantic City, SMG offered in evidence the testimony of Mr. Bob Hiss. Annexed hereto as Exhibit D is a true and correct copy of the Direct Examination Affidavit of Bob Hiss ("Hiss Aff.") served upon PMG.

7. The Hiss Aff. references SMC Exhibits 14, 16, and 51. Annexed hereto as Exhibit E are true and correct copies of SMC Exhibits 14, 16, and 51 served upon PMG and referenced in the Hiss Aff.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York  
June 3, 2008



Christine Tramontano

## **EXHIBIT A**

James V. Marks (JM 6257)  
HOLLAND & KNIGHT LLP  
195 Broadway  
New York, NY 10007  
(212) 513-3200

Attorneys for Plaintiff-Petitioner  
Penrod Management Group

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

PENROD MANAGEMENT GROUP,

Plaintiff-Petitioner,  
- against -

Civil Action No.:

07-cv-10649

STEWART'S MOBILE CONCEPTS, LTD.,

**PETITION**

Defendant-Respondent.

---

Petitioner, Penrod Management Group, as and for its Petition against Respondent, Stewart's Mobile Concepts, Ltd., hereby respectfully alleges as follows:

**NATURE OF ACTION**

1. This is a proceeding pursuant to Fed. R. Civ. Pro. 65 to enjoin the arbitration proceedings that Stewart's initiated against the Penrod before the American Arbitration Association.
2. The arbitration proceedings should be stayed because there is no enforceable arbitration agreement between and among Penrod and Stewart's.
3. No previous application for the relief herein sought has been made.
4. Penrod makes this Petition for the sole and limited purpose of challenging the jurisdiction of the arbitration proceedings. By submitting this Petition, Penrod does not consent

to the general jurisdiction of any court in New York or to the jurisdiction of the arbitration proceedings. Penrod expressly reserves all of its rights and defenses, including, but not limited to, service and jurisdictional defenses, that may be asserted in the arbitration proceedings or in any court.

### **THE PARTIES**

5. Petitioner Penrod Management Group is a corporation organized under the laws of the State of Florida and maintains its principal place of business at 1 Ocean Drive, 4<sup>th</sup> Floor, Miami Beach, Florida 33139.

6. Upon information and belief, Respondent Stewart's Mobile Concepts, Ltd. is a corporation organized under the laws of the State of New York and maintains its principal place of business at 845 East Jericho Turnpike, Huntington Station, New York, 11746-7504.

### **PERSONAL JURISDICTION AND VENUE**

7. The Court has original jurisdiction of this matter under 28 U.S.C. § 1332 because complete diversity of citizenship exists between Penrod (Penrod Management Group is a Florida corporation with its principal place of business in Florida) and Stewart's (upon information and belief, Stewart's Mobile Concepts, Ltd. is a New York corporation with its principal place of business in New York). The matter in controversy is in excess of \$75,000 because it involves a Demand for Arbitration pursuant to an Equipment Lease Agreement between Stewart's and the entity Nikki Beach Atlantic City, LLC under which Stewart's is seeking damages from Penrod in an amount more than \$200,000 but less than \$300,000.

8. Venue is proper in this District because the arbitration proceeding that is the subject of this action, if not declared to be unlawful and/or enjoined by this Court, would be conducted within the county of New York in this District.

## **BACKGROUND**

### **A. The Equipment Rental Agreement**

9. On or about April 18, 2005, Stewart's entered into an Equipment Rental Agreement, (the "Agreement") with Nikki Beach Atlantic City, LLC ("Nikki Beach"), whereby Stewart's agreed to lease ten pieces of equipment to Nikki Beach.

10. The Agreement provides that the parties will submit the matter to binding arbitration in New York in the event that any dispute arose between Stewart's and Nikki Beach.

11. Section Twenty-Two of the Agreement provides (emphasis added):

**Arbitration:** In the event that any dispute between *the parties to this Agreement* cannot be settled, the matter shall be submitted to binding arbitration. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association, with the prevailing party to be awarded all costs of arbitration and reasonable attorneys fees. The arbitration shall be held in Suffolk County, New York. Any judgment upon an award may be entered in the State(s) and Count(ies) where the lessor and lessee do business.

12. Penrod is not a party to the Agreement and did not execute the Agreement in any capacity.

### **B. The Demand for Arbitration and Status of the Arbitral Proceeding**

13. On or about September 20, 2006, Stewart's initiated the arbitration against Penrod and Nikki Beach before the American Arbitration Association, Case No. 13-118-02115-06 (the "New York Arbitration").

14. In the demand for arbitration, Stewart's asserts claims against Penrod for breach of the Agreement.

15. Stewart's also asserts claims against Nikki Beach for breach of the Agreement.

16. Specifically, Stewart's alleges that Penrod and Nikki Beach breached the Agreement by damaging the equipment and failing to pay.

17. Stewart's bases its demand for arbitration on the arbitration clause set forth in Section Twenty-Two of the Agreement between Stewart's and Nikki Beach.

18. To date, Penrod has participated only minimally in the arbitration proceedings in order to contest jurisdiction.

19. On or about July 27, 2007, Penrod filed a motion to the arbitrator to dismiss the claim of Stewart's for lack of jurisdiction.

20. Subsequently, the arbitrator issued an opinion denying Penrod's motion to dismiss, notwithstanding the fact that Penrod is not a signatory to any arbitration agreement with Stewart's on the basis that Penrod may be compelled to arbitrate pursuant to the Agreement on an alter ego theory. The arbitrator, therefore, determined that Stewart's was entitled to limited discovery from Penrod relating to the alter ego issue. Penrod complied with the order and provided Stewart's with documentation.

21. Filing the motion to dismiss for lack of jurisdiction and providing Stewart's with limited discovery relating to the alter ego issue was the extent of Penrod's participation in the arbitration proceedings.

**CLAIMS FOR RELIEF**

**COUNT I**

22. Penrod repeats and realleges each and every allegation contained within paragraphs 1 through 21 inclusive of this Petition with the same force and effect as if set forth at length herein.

23. Penrod is not a proper party to the arbitration proceeding commenced by the Stewart's because there is no enforceable arbitration agreement between Penrod and Stewart's.

24. Based upon the foregoing, Penrod respectfully requests that Stewart's Demand for Arbitration be vacated.

**COUNT II**

25. Penrod repeats and realleges each and every allegation contained within paragraphs 1 through 24 inclusive of this Petition with the same force and effect as if set forth at length herein.

26. The New York Arbitration is pending and a hearing is scheduled for December 3, 2007.

27. If the Court declares that the arbitrator has no jurisdiction over Stewart's claims against Penrod, Penrod cannot be forced to participate in the arbitration proceedings.

28. Based upon the foregoing, Penrod respectfully request that the arbitration proceedings be stayed pursuant to Fed. R. Civ. Pro. 65(a) pending the resolution of the instant matter.

**COUNT III**

29. Penrod repeats and realleges each and every allegation contained within paragraphs 1 through 28 inclusive of this Petition with the same force and effect as if set forth at length herein.

30. Penrod has a likelihood of success on the claims asserted herein.

31. Penrod will be prejudiced if it is forced to participate in the arbitration proceedings while the instant application is pending.

32. The issuance of a temporary restraining order will simply maintain the status quo while the instant application is pending.

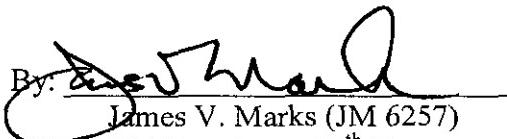
33. Based upon the foregoing, Penrod respectfully requests that the Court issue a temporary restraining order pursuant to Fed. R. Civ. Pro. 65(b) enjoining Penrod and Stewart's from participating in the arbitration proceedings.

WHEREFORE, Petitioner, Penrod Management Group, respectfully requests that judgment be entered herein against Stewart's, Stewart's Mobile Concepts, Ltd., staying and perpetually barring the arbitration proceedings and vacating the Demand for Arbitration, and granting Penrod such other and further relief as the Court deems just and proper.

Dated: New York, New York  
November 28, 2007

Respectfully submitted,

HOLLAND & KNIGHT LLP

By:   
James V. Marks (JM 6257)  
195 Broadway, 24<sup>th</sup> Floor  
New York, NY 10007  
(212)-513-3200

Attorneys for Plaintiffs-Petitioners, Penrod Management Group Petitioner

# 4957242\_v1

## **EXHIBIT B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

PENROD MANAGEMENT GROUP,

Plaintiff-Petitioner,

07 Civ. 10649 (JGK)

- against -

STEWART'S MOBILE CONCEPTS, LTD.,

OPINION AND ORDER

Defendant-Respondent.

---

JOHN G. KOELTL, District Judge:

Stewart's Mobile Concepts, Ltd. ("Stewart's"), the defendant-respondent, was a party to an equipment lease agreement (the "Agreement") with Nikki Beach Atlantic City, LLC ("Nikki Beach"). The Agreement provides that the parties will submit any dispute to binding arbitration in New York, and that the Agreement "shall be construed in accordance with New York law." (Mulvany Certification Ex. A.) On or about September 20, 2006, Stewart's commenced an arbitration against Nikki Beach and Penrod Management Group ("Penrod"), the plaintiff-petitioner. The arbitration demand alleged that Nikki Beach damaged the equipment and failed to pay pursuant to the Agreement. At some point prior to October 2006, Nikki Beach was dissolved and Stewart's was notified that Nikki Beach would not be represented at the arbitration.

On or about July 27, 2007, Penrod filed a motion to dismiss with the arbitrator, on the grounds that the arbitrator lacked

jurisdiction over Penrod because Penrod was not a party to the Agreement. Stewart's responded by arguing that Penrod was an alter ego of Nikki Beach. In its motion to dismiss, Penrod did not argue that the arbitral panel was not the appropriate body to decide the alter ego issue. On August 16, 2007, the arbitrator issued a written opinion denying the motion to dismiss without prejudice pending discovery on the alter ego issue. (Mulvaney Certification Ex. K.) Discovery subsequently proceeded on the alter ego issue and concluded with a stipulation that all documents on the alter ego issue were produced. (Mulvaney Certification Ex. R.) The arbitrator has not ruled on the alter ego issue or on the underlying merits of the dispute. Penrod now moves for a stay of the arbitration proceedings pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

I.

The general rule is that arbitrability is a matter for the Court to decide. See Spear, Leeds & Kellogg v. Cent. Life Assur. Co., 85 F.3d 21, 25 (2d Cir. 1996). This rule applies to the determination of whether a party can be compelled to arbitrate as an alter ego of a party to an arbitration agreement. See Data-Stream AS/RS Techs., LLC v. China Int'l. Marine Containers, Ltd., No. 02 Civ. 6530, 2003 WL 22519456, at

\*3 (S.D.N.Y. Nov. 6, 2003). Indeed, Stewart's concedes that this is the correct rule of law to be applied. However, it is also well settled that an agreement to arbitrate may be implied from a party's conduct in arbitration proceedings. See Gvozdenovic v. United Air Lines, 933 F.2d 1100, 1105 (2d Cir. 1991).

Stewart's argues that Penrod waived its right to object to the jurisdiction of the arbitrator to decide if it was bound by the Agreement by submitting the question of arbitrability to the arbitrator, attending several case management conferences, consenting to venue in New York City, producing discovery as directed by the arbitrator, and serving its pre-hearing witness and exhibit lists. Penrod responds that its participation in the arbitration is insufficient to effectuate a waiver of its jurisdictional objection.

The Federal Arbitration Act (the "FAA") applies to this case, because there is diversity jurisdiction and the underlying contract "evidenc[es] a transaction involving interstate commerce." 9 U.S.C. § 2; see also Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117, 120 (2d Cir. 1991). The Agreement includes a choice of law clause which states that the "Agreement shall be construed in accordance with New York law." (Mulvaney Certification Ex. A.) In its opposition papers, the plaintiff appears to argue that the Court should apply the waiver

provisions of Section 7503(b) of the New York Civil Practice Law and Rules ("CPLR") rather than the standards applicable to waiver under the FAA, which are more difficult to satisfy.

This argument is without merit. Penrod cannot be bound by the New York choice of law provision in the Agreement without an initial determination that it is bound by the Agreement.

Whether Penrod is bound by the Agreement as the alter ego of Nikki Beach will be decided by ordinary contract and agency principles. See Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776-78 (2d. Cir. 1995); see also HD Brous & Co. v. Mrzyglocki, No. 03 Civ. 8385, 2004 WL 376555, at \* 6-\*7 (S.D.N.Y. Feb. 26, 2004). The central dispute on this motion is whether that determination should be made in the first instance by the arbitrator or this Court. It would not be appropriate to enforce the choice of law provision against Penrod before it has been determined that Penrod is in fact bound by the Agreement.

In any event, under New York law, the choice of law provision in the Agreement would apply the waiver standards of the FAA rather than the waiver standards of Section 7503(b) of the CPLR to determine whether Penrod had waived its right to have a Court decide whether it was bound by the arbitration provision of the Agreement even though it was not a signatory. The New York Court of Appeals has held that New York arbitration law applies in cases otherwise governed by the FAA where the

choice of law provision "states that New York law shall govern both the agreement and its enforcement." Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp., 826 N.E.2d 802, 806 (N.Y. 2005) (emphasis omitted); see also Smith Barney, Harris Upham & Co. v. Luckie, 647 N.E.2d 1308, 1313 (N.Y. 1995). However, "[i]n the absence of more critical language concerning enforcement," the New York Court of Appeals has found that the parties did not intend to modify the default rules of the FAA. See Diamond Waterproofing, 826 N.E.2d at 806. In this case, the choice of law provision states only that the Agreement "shall be construed in accordance with New York law." (Mulvaney Certification Ex. A.) This language is insufficient to find that the parties intended Section 7503(b) to govern the issue of waiver.

Therefore, the Court will apply the federal standards applicable to the waiver of a jurisdictional objection rather than the waiver standard under New York law. See Herman Miller, Inc. v. Worth Capital, Inc., No. 97 Civ. 7878, 1998 WL 193213, at \*3 & n.1 (S.D.N.Y. Apr. 21, 1998) (declining to apply Section 7503(b) in a case arising under the FAA), aff'd, 173 F.3d 844 (2d Cir. 1999).

While courts generally should apply ordinary state-law principles when deciding whether the parties agreed to arbitrate a certain matter, the Supreme Court has "added an important

qualification" by holding that courts "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." First Options, 514 U.S. at 944 (alterations in original) (citation omitted). The case law in this Circuit is clear that "to the extent that [a party] participate[s] in the arbitration hearings in order to resolve the question of arbitrability itself, such participation does not constitute waiver." Opals on Ice Lingerie v. Body Lines Inc., 320 F.3d 362, 369 (2d Cir. 2003); see also First Options, 514 U.S. at 946 (1995) ("[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue."). Therefore, Penrod did not waive its objection to arbitrability when it filed its motion to dismiss for lack of jurisdiction with the arbitrator.<sup>1</sup>

Nor does Penrod's other participation in the arbitration constitute a waiver of its jurisdictional objection. Penrod participated in case management conferences, consented to venue

---

<sup>1</sup> Stewart's relies on Sec. Ins. Co. v. TIG Ins. Co., 360 F.3d 322 (2d Cir. 2004), for the proposition that this Court must apply the New York law relating to waiver. Stewart's' reliance is misplaced. TIG involved the application of a California rule relating to the procedural mechanism by which a pending Court proceeding could continue while an arbitration was stayed. TIG did not concern the issue of who should decide the issue of arbitrability or what constitutes a waiver of the Supreme Court's presumption in First Options that the Court is to decide that question unless the parties had unmistakably indicated an agreement to arbitrate the issue. Moreover, TIG concerned the construction of a California choice of law provision to which the parties had indisputedly agreed, unlike in this case where it has yet to be determined whether Penrod is bound by the terms of the Agreement.

in New York City, produced discovery on the alter ego issue, and served its pre-hearing witness and exhibit lists. In similar circumstances, courts have found this type of participation to be insufficient for a finding of waiver. See Herman Miller, 1998 WL 193213, at \*3 (finding no waiver where party participated in choosing an arbitrator and selecting arbitration dates); cf. Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home and Allied Services Union, 788 F.2d 894, 899 (2d Cir. 1986) (finding no waiver where "participation was minimal, amounting for the most part to efforts to postpone and delay arbitration"). The cases cited by Stewart's are distinguishable because they either involve the application of New York law, which the parties concede provides a less onerous standard to find waiver, or involve situations where a party submitted the merits of the claim to the arbitrator and awaited the arbitrator's decision prior to seeking a stay. See, e.g., Merrill Lynch & Co. v. Optibase, Ltd., No. 03 Civ. 4191, 2003 WL 21507322, at \*3-\*5 (S.D.N.Y. June 30, 2003); Walter H. Jones v. Watts Investment Co, 99 Civ. 10590, 2000 WL 546490, \*3-\*4 (S.D.N.Y. May 3, 2000); N.Y. Hotel & Motel Trades Council, AFL-CIO v. Hotel Nikko of New York, Inc., No. 91 Civ. 0795, 1991 WL 168284, at \*4-\*5 (S.D.N.Y. Aug. 22, 1991); Halley Optical Corp. v. Jagar Int'l Mktg. Corp., 752 F.Supp. 638, 639 (S.D.N.Y. 1990). Penrod did not submit the merits of the dispute to the

arbitrator prior to seeking a stay and its participation in the arbitration thus far has been minimal.<sup>2</sup>

Therefore, the Court finds that Penrod has not waived its objection to the jurisdiction of the arbitrator.

## II.

The Court now turns to whether Penrod has satisfied the standards for the issuance of a preliminary injunction.

[A] party seeking a preliminary injunction must demonstrate (1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Fed. Express Corp. v. Fed. Espresso, Inc., 201 F.3d 168, 173 (2d Cir. 2000). Because there is no waiver of Penrod's jurisdictional objection, the motion for an injunction should be granted.

Penrod, a non-signatory to the Agreement, has shown a likelihood of success on the merits of its claim that the arbitration should be stayed pending a decision by this Court on

---

<sup>2</sup> Stewart's also relies on Sands Bros. & Co. v. Zipper, where the court found that the plaintiff had waived his right to object to the arbitration. No. 03 Civ. 7731, 2003 WL 22439789, at \*3 (S.D.N.Y. Oct. 27, 2003). However, Sands Bros. is factually distinguishable from this case. In Sands Bros., the Court noted that the plaintiff had "actively participated in [the arbitration] for at least eleven months," the parties had completed discovery on the merits, and the plaintiff had "argued the merits of the matter—the same issues it now raises before this Court—in a motion for summary judgment" submitted to the arbitrator. Id. at \*2. Penrod's participation was much less significant than the participation of the plaintiffs in Sands Bros. and Merrill Lynch, 2003 WL 21507322.

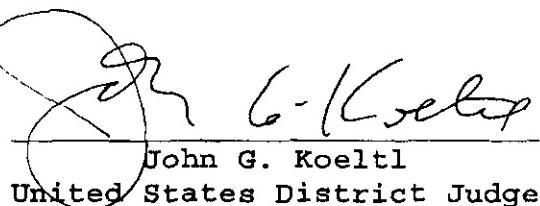
whether it is bound to proceed with the arbitration. Stewart's will bear the burden of proving that Penrod is the alter ego of Nikki Beach. Furthermore, Penrod would be irreparably harmed if forced to expend time and resources arbitrating an issue that is not subject to arbitration. Masefield AG v. Colonial Oil Indus., Inc., No. 05 Civ. 2231, 2005 WL 911770, at \*7 (S.D.N.Y. Apr. 18, 2005) (citing Md. Cas. Co. v. Realty Advisory Bd. on Labor Relations, 107 F.3d 979, 985 (2d Cir. 1997)). Penrod should not be required to proceed with the arbitration until it is determined by this Court that Penrod was the alter ego of Nikki Beach.

#### CONCLUSION

The foregoing constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. For the reasons stated above, Penrod's motion for a stay of the arbitration pending this Court's decision on the issue of whether Penrod is required to proceed with the arbitration is granted.

SO ORDERED.

Dated: New York, New York  
February 16, 2008



John G. Koeltl  
United States District Judge

## **EXHIBIT C**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

PENROD MANAGEMENT GROUP, INC.

07-CV-10649

Plaintiff-Petitioner,

- against -

STEWART'S MOBILE CONCEPTS, LTD.,

DIRECT EXAMINATION  
DECLARATION OF JOHN  
MICHAEL REGISTER IN  
SUPPORT OF PENROD

Defendant-Respondent. **MANAGEMENT GROUP, INC.**

---

I, John Michael Register, being duly sworn, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

**A. Professional Background**

1. I am an attorney admitted to practice law in the State of Florida since 1984. Since 2006, I have served as the Vice President of New Properties for Penrod Management Group, Inc. ("PMG"). In 2005, I served as the General Counsel to PMG and Nikki Beach Atlantic City LLC ("NBAC"). As such, I am fully familiar with the facts set forth herein.

**B. The Nikki Beach™ Brand**

2. The Nikki Beach brand was established in 1998 and introduced a beach club concept bringing dining, fashion, music, and entertainment together.

3. Today, the Nikki Beach trademark is associated with a long line of successful upscale beach clubs at locations throughout the United States and around the world. Nikki Beach venues include Miami Beach, Coconut Grove, Hollywood, New York, Reno, St. Barth, Cabo San Lucas, Puerto Vallarta, St. Tropez, Marbella, Morocco, and Portugal.

4. The Nikki Beach concept has expanded into magazines, clothing, music, news, VIP programming, furniture, and special events. Earlier this year, the first Nikki Beach hotel opened in Turks and Caicos.

5. Each Nikki Beach venue and business concept has its own separate corporate structure and management (collectively, "the Nikki Beach Entities"). The Nikki Beach Entities are separate and distinct legal entities with independence, autonomy, and management responsibility.

6. PMG provides oversight with respect to the initial organization and structure of the Nikki Beach Entities. It also provides accounting and legal services to the Nikki Beach Entities in exchange for a management fee. PMG plays no role in the day-to-day operations of the Nikki Beach Entities. The day-to-day operations are controlled by, and business decisions are made by, the officers of each respective Nikki Beach entity.

**C. Formation of Nikki Beach Atlantic City LLC**

7. As it did for other Nikki Beach Entities, PMG initiated the formation of NBAC in New Jersey.

8. On March 4, 2005, NBAC was duly formed, registered, and licensed in New Jersey by the law firm of DeLucry and Sandson, in Atlantic City, New Jersey. NBAC had its principal place of business in Atlantic City, New Jersey.

9. NBAC was formed to operate a beach club, restaurant, and concert venue on the Jersey shore at Resorts International Hotel in Atlantic City, New Jersey. *See* PMG Ex. A. NBAC was a multi-tiered entertainment complex with an architectural design, style, sophistication, and attitude that was intended to redefine the boardwalk.

**D. Start Up Operations of Nikki Beach Atlantic City LLC**

10. NBAC opened on May 27, 2005 and operated through the second week of September 2005.

11. In order to operate the beach club, it was necessary for NBAC to petition the New Jersey Casino Control Commission to establish the beach areas in front of the Hotel as a "related facility" and expand the casino hotel alcoholic beverage license to the NBAC operation. *See* PMG Ex. A.

12. A license was subsequently issued to NBAC d/b/a Nikki Beach. PMG Ex. H.

13. On March 21, 2005, a Federal Tax ID number was issued to NBAC and registered with the New Jersey Division of Revenue. PMG Ex. A.

14. On March 23, 2005, NBAC received a Certificate of Authority from the State of New Jersey, Division of Taxation. PMG Ex. B.

15. On March 25, 2005, NBAC received a business registration certificate from the State of New Jersey, Department of Treasury. PMG Ex. C.

16. The New Jersey Department of Labor officially recognized NBAC as an employer subject to the New Jersey Unemployment Compensation law, with liability beginning on April 1, 2005. PMG Ex. D.

17. NBAC hired approximately four hundred employees to operate the beach club. *See* PMG Ex. N.

18. NBAC applied for a Life Hazard Use Certificate of Registration which was issued by the State of New Jersey, Department of Community Affairs, and Division of Fire Safety on April 25, 2005. PMG Ex. J.

#### **E. NBAC Financials**

19. NBAC was open for three and a half months during the summer of 2005. After being well promoted, NBAC failed to draw budgeted numbers. While NBAC grossed approximately one and a half million dollars, NBAC's expenses far exceeded its revenues. For the year 2005, NBAC experienced a loss of \$1,565,942.78. *See* PMG Ex. L.

20. NBAC prepared financial statements on a routine, periodic, and ongoing basis in accordance with generally accepted accounting principles. The year end results for 2005 have been pre-marked as PMG Ex. L.

21. NBAC was capitalized with loans from PMG, which incurred more than a million dollar loss from the operation.

**F. Contract with Stewart Mobile Concepts, Ltd.**

22. On or about April 18, 2005, I, on behalf of NBAC, signed a rental agreement with Stewart Mobile Concept ("SMC") for kitchen equipment to be used by NBAC at the Resorts International Hotel in Atlantic City, New Jersey. SMC Ex. 12.

23. Under the rental agreement, SMC agreed to lease NBAC ten pieces of kitchen equipment for which NBAC was to make monthly lease payments.

24. PMG is not a party to the rental agreement and did not execute the agreement. *See* SMC Ex. 12.

25. SMC (unlike Mr. John, Inc.) never asked PMG to guarantee the contract.

26. On April 18, 2005 and April 22, 2005, PMG paid SMC the original down payments on behalf of NBAC because NBAC's bank accounts were in the process of being opened. NBAC directly made the third payment to SMC in July

2005 after its bank account had been established. NBAC reimbursed PMG for advancing the down payments.

27. SMC sent all seven of its invoices for outstanding amounts to NBAC, as evidenced by SMC Exs. 9, 21, 25, 29, 30, 31 and 32. The SMC invoices were not directed to PMG and PMG was not identified anywhere on the invoices.

**G. Reply to Affidavit of Keith Futerma**

28. Contrary to SMC's representations concerning SMC Exs. 11, 24, and 26, I never represented myself as the employee of PMG. Rather as specified in the signature stamp on the referenced exhibits, I represented the interests of Nikki Beach.

29. The emails from Michael Penrod never referenced PMG. *See* SMC Exs. 2, 3, and 8.

30. Contrary to the statement in Mr. Keith Futerma's affidavit at paragraph 9, the questionnaire filled out by Michael Penrod is void of any reference to PMG. *See* SMC Ex. 2.

31. SMC sent the invoices to NBAC not to PMG, as suggested by Mr. Keith Futerma (Futerma Aff. ¶ 20).

32. It must also be noted that SMC states that Bruce Hanrahan and Tim Hughes were employed by PMG. However the emails relied on by SMC (SMC Exs. 5 & 8) list and refer to them at "Nikki Marina".

33. The Nikki Beach Entities use One Ocean Drive, Miami Beach, Florida as an address, a premier location and prestigious address on the most fashionable street in Miami, with the central telephone number (305) 538-1111. However, the telephone is answered "Nikki Beach", not Penrod Management Group as Mr. Keith Futterman suggested in his affidavit at paragraph 9.

#### **H. Closure of Nikki Beach Atlantic City**

34. The beach club industry is highly susceptible to economic downturn. Nikki Beach Entities have enjoyed success by promoting international DJ's and inter-active entertainment with a fashion show backdrop. However, after being well promoted, NBAC failed to draw budgeted numbers and was closed.

35. In retrospect, a lethal combination of bad summer weather, crippling cost overruns, and a venue that was too large (50,000 square feet) doomed the project. It was expected that the complex would draw customers from New York City and Philadelphia; however, these expectations failed to materialize.

36. At the end of the 2005 summer, after the books were closed, the business was evaluated and it was determined that it could not be a success in the existing venue. The decision was made to cease operations. NBAC did not re-open.

37. The entire income of NBAC and capitalization contributed by PMG was used to pay as much of the debt as possible.

38. SMC is recognized as a creditor under the NBAC A/P Aging Summary and outstandings were recorded in the Vendor Quick Report within the NBAC accounting system. See PMG Ex. M.

39. NBAC filed a 2005 Federal Tax Return and received a net adjustment credit of \$393.61. See PMG Ex. I.

40. Thereafter NBAC filed a certificate of cancellation with the State of New Jersey, Department of Revenue. PMG Ex. K.

**I. Penrod Management Group is not the alter ego of Nikki Beach Atlantic City LLC**

41. NBAC was an operating company with its own source of income. It maintained its own bank accounts. NBAC was not a mere instrumentality of PMG. The funds of NBAC were not co-mingled with PMG's funds. PMG did not use NBAC to perpetrate a fraud or to circumvent the law.

42. NBAC had its own officers who were responsible for the daily management of the corporation. Michael Penrod was in charge of the NBAC operation, lived in New Jersey, and had no position with PMG. NBAC had its own management staff working exclusively at the venue.

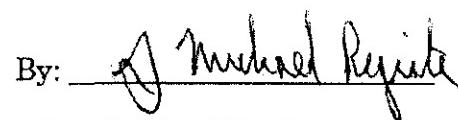
43. PMG received no management fees from NBAC because of NBAC's unexpected lack of profit. In fact, other than the reimbursement for the original two down payments advanced to SMC on the rental agreement, PMG received no funds from NBAC.

44. NBAC maintained its own financial records and other corporate files necessary to the operation of the entity. Bookkeeping was maintained in the Atlantic City office of NBAC on a daily basis by employees of NBAC. When the company ceased operations, all records were placed and retained in a storage facility by Resorts International Hotel Inc.

45. NBAC had separate financials, followed statutory formalities and had a distinct division of authority within the Nikki Beach Entities.

I declare under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Dated: May 19, 2008

By:   
John Michael Register

# 5345911\_v5

**EXHIBIT D**

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP  
 88 Pine Street  
 24<sup>th</sup> Floor  
 New York, New York  
 Telephone: (212) 483-9490  
 Facsimile: (212) 483-9129  
 Attorneys for Defendant-Respondent,  
 Stewart's Mobile Concepts, Ltd.

UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF NEW YORK

---

PENROD MANAGEMENT GROUP,	:	: Civil Action No. 07-10649
INC.,	:	: (JGK/DFE)
	:	
Plaintiff-Petitioner,	:	: DIRECT EXAMINATION AFFIDAVIT
v.	:	: OF BOB HISS IN SUPPORT OF
STEWART'S MOBILE CONCEPTS,	:	: DEFENDANT-RESPONDENT, STEWART'S
LTD.,	:	: MOBILE CONCEPTS, LTD.
	:	
Defendant-Respondent.	:	
	:	
	:	

---

STATE OF NEW JERSEY )  
                       )  
                       ) ss  
 COUNTY OF MIDDLESEX )

I, Bob Hiss, being duly sworn, deposes and says:

1. I am the Accounts Receivable Manager for Mr. John, Inc. ("Mr. John") and, as such, I have personal knowledge of the facts set forth herein. I provide this affidavit in lieu of direct testimony in support of Defendant-Respondent Stewart's Mobile Concepts, Ltd.

A. Professional Background and Responsibilities

2. I am the Accounts Receivable Manager for Mr. John and, as of May 2008, will have served in that capacity for four years.

3. My responsibilities include overseeing Mr. John's accounts receivable department, interacting and corresponding with customers, reviewing and preparing invoices for Mr. John's services, and addressing and resolving outstanding balances owed to Mr. John by its customers.

B. Mr. John Billing Practices

4. Mr. John typically bills its customers on a monthly basis by sending invoices for services rendered directly to the customer for payment.

5. If a new customer inquires about and requests Mr. John's products and services, we first provide the potential new customer with a credit application to be completed and returned to Mr. John.

6. Mr. John requires a credit application from potential new customers to determine the potential new customer's credit worthiness and ability to pay for Mr. John's products and services.

7. Mr. John's credit application is a two-paged document that requires the applicant to abide by Mr. John's standard terms and conditions as to any presently outstanding or future

account balances. The credit application also requests the applicant to provide its full corporate name; proper billing address; current telephone and facsimile numbers; whether the applicant is listed and rated with Dunn & Bradstreet; trade references, and their contact information; bank references and account numbers. By signing the credit application, the applicant authorizes the release of any and all credit information to Mr. John from the listed trade references. The General Terms and Conditions, which appear on the second page of the credit application, provide that the applicant, among other things, agrees to certain delineated payment terms.

4. If, after receiving a completed credit application from a potential new customer, a credit check revealed a poor credit rating, then Mr. John would not enter a contract with that potential new customer.

C. The Credit Application with Penrod Management and Resulting Contract

5. In or about April 2005, Mr. John sent Penrod Management Group, Inc. ("Penrod Management") a credit application (the "Credit Application") because Penrod Management, as a potential new customer, had inquired about Mr. John's products and services. Mr. John sent the Credit Application to Penrod Management so that Mr. John could perform a credit check on, and establish credit for, Penrod Management

pending it had a good credit rating. Defendant-Respondent's Exhibit 14 is the credit application that Mr. John sent to Penrod Management.

6. On April 21, 2005, Danielle Houser, on behalf of Penrod Management, completed and submitted the Credit Application to Mr. John. In response to the Credit Application, Ms. Houser provided Penrod Management's address; telephone and facsimile numbers; credit references; bank references and account number; and indicated whether Penrod Management was listed and rated with Dunn & Bradstreet. Defendant-Respondent's Exhibit 14 is the Credit Application that was submitted to Mr. John by Penrod Management.

D. The Wire Transfer from Penrod Management and Subsequent Invoices from Mr. John

11. On April 26, 2005, Mr. John received a wire transfer from Penrod Management's Bank of America account in the amount of \$17,700, which represented the initial deposit for the April 25, 2005, Agreement. Defendant-Respondent's Exhibit 16 is the confirmation of Mr. John's receipt of the \$17,700 wire transfer from Penrod Management's bank account.

12. On May 27, 2005, in accordance with the information provided by Ms. Houser on the Credit Application on behalf of Penrod Management, Mr. John mailed Invoice # 312744 to Penrod Management in the amount of \$26,085.71. The invoice was sent to

Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139. Defendant-Respondent's Exhibit 51 is the May 27, 2005, invoice that Mr. John sent to Penrod Management.

13. On June 24, 2005, in accordance with the information provided by Ms. Houser on the Credit Application on behalf of Penrod Management, Mr. John mailed Invoice # 398618 to Penrod Management in the amount of \$21,201. The invoice was sent to Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139. Defendant-Respondent's Exhibit 51 is the June 24, 2005, invoice that Mr. John sent to Penrod Management.

14. On July 22, 2005, in accordance with the information provided by Ms. Houser on the Credit Application on behalf of Penrod Management, Mr. John mailed Invoice # 475833 to Penrod Management in the amount of \$21,012. The invoice was sent to Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139. Defendant-Respondent's Exhibit 51 is the July 22, 2005, invoice that Mr. John sent to Penrod Management.

15. On August 19, 2005, in accordance with the information provided by Ms. Houser on the Credit Application on behalf of Penrod Management, Mr. John mailed Invoice # 561886 to Penrod Management in the amount of \$21,754. The invoice was sent to Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139. Defendant-Respondent's Exhibit 51 is the August 19, 2005, invoice that Mr. John sent to Penrod Management.

16. On September 16, 2005, in accordance with the information provided by Ms. Houser on the Credit Application on behalf of Penrod Management, Mr. John mailed Invoice # 631700 to Penrod Management in the amount of \$20,400. The invoice was sent to Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139. Defendant-Respondent's Exhibit 51 is the September 16, 2005, invoice that Mr. John sent to Penrod Management.

17. On September 21, 2005, in accordance with the information provided by Ms. Houser on the Credit Application on behalf of Penrod Management, I wrote to Mr. Register of Penrod Management and indicated that the aforementioned invoices were past due and requested payment. I sent my letter to Mr. Register's attention at Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139. Defendant-Respondent's Exhibit 51 is my September 21, 2005, letter to Mr. Register.

18. At no time did Mr. Register or anyone else from Penrod Management contact me or otherwise inform me that I was sending Mr. John's invoices and my September 21, 2005, letter to the wrong entity and address.

19. I sent Mr. John's invoices and the September 21, 2005, letter to Penrod Management's address at 1 Ocean Drive, Miami Beach, Florida 33139 because, pursuant to the Credit

Application, Penrod Management was the applicant, customer and entity responsible for the outstanding balance.

20. All of my communications regarding Mr. John's invoices, and Penrod Management's outstanding balance with Mr. John were with employees, agents or representatives of Penrod Management.

21. At no time did Mr. Register or anyone else from Penrod Management contact me or otherwise inform me that Penrod Management was not responsible for the outstanding balance owed to Mr. John.

I declare under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Dated: May 5, 2008

By:

Bob Hiss  
Bob Hiss

Notary Public

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC

STATE OF NEW YORK )  
                        )  
                        >) ss  
COUNTY OF MIDDLESEX )

On 5-5-08, before me, \_\_\_\_\_, a notary public, personally appeared Bob Hiss, a representative of Mr. John, Inc., and that Mr. Hiss is duly authorized to make this affidavit on behalf of the corporate Respondent-Defendant herein.

WITNESS my hand and official seal.

JACQUELINE K. FARMAN  
NOTARY PUBLIC OF NEW JERSEY  
MY COMMISSION EXPIRES FEBRUARY 11, 2012

Signature

Jacqueline K. Farman

**EXHIBIT E**

**SMC Exhibit 14**

Mar 23 06 02:45p

NIKKI BEACH

305 534 7253

p.5



the complete source for  
temporary restrooms

MJP Use Only

Service Scheduled For:

Sponsor:

Value of Service

## CREDIT APPLICATION

## PLEASE TYPE OR PRINT ALL INFORMATION

The undersigned hereby applies for credit with Mr. John and agrees to abide by its standard terms and conditions as printed below as to any presently outstanding or future account balances.

DATE	FEDERAL ID#	DATE STARTED:
4/21/05	65-1151495	
FIRM'S LEGAL NAME:	DIA:	
Penrod Management Group, Inc.		
BILLING ADDRESS:	1 Ocean Drive	
CITY/STATE/ZIP:	Miami Beach, FL 33139	
OFFICE ADDRESS (IF DIFFERENT FROM ABOVE):		
CITY/STATE/ZIP:		
PHONE NUMBER:	FAX NUMBER	RATED IN DIA?
305-538-1111	305-534-7253	<input checked="" type="checkbox"/> NO <input type="checkbox"/> YES RATING (IF KNOWN):
AMOUNT OF CREDIT REQUIRED:	PURCHASE ORDER REQUIRED?	
	<input type="checkbox"/> NO <input checked="" type="checkbox"/> YES	
DESCRIPTION OF BUSINESS: <input checked="" type="checkbox"/> 1. SOLE PROPRIETORSHIP <input type="checkbox"/> 2. GENERAL PARTNERSHIP	<input checked="" type="checkbox"/> 3. CORPORATION <input type="checkbox"/> NON PROFIT ORGANIZATION (ATTACH TAX EXEMPT CERTIFICATE)	

NOTE: If numbers 1 or 2 are checked above, please fill in the following information:

NAME OF PRINCIPALS	RESIDENTIAL STREET ADDRESS - CITY/STATE/ZIP	SS#	DATE OF BIRTH
1			
2			
3			

## TRADE REFERENCES

NAME	CONTACT	ADDRESS	PHONE	FAX
1 Sysco Foods	John Hussey	P.O. Box 64000-A Miami, FL 33164	1-800-877-4786	
2 Henry LCC	Joe Knafo	3801 NW 125th St Miami, FL	305-685-5850	
3 Kitchens of the Ocean	John	P.O. Box 276003 Boca Raton, FL 33427	1-800-327-0132	
4 Southern Wine & Spirits		1600 NW 116th St Miami, FL 33169	305-625-4171	
5 Premier Beverage	Michael Staruk	P.O. Box 5500 Miramar, FL 33083	305-766-8973	

ext 2050

## BANK REFERENCE

NAME	CONTACT	ADDRESS	PHONE
Bank of America	Paula Campos	701 Brickell Ave Miami, FL 33131	305-350-7035
ACCOUNT NUMBER:	0054 8400 7077		
TYPE OF ACCOUNT:	Checking		

I hereby authorize the release of any and all credit information to Mr. John from the above listed references.

AUTHORIZED SIGNATURE	TITLE
Danielle M Hauser	Accountant
PRINT NAME	DATE
Danielle Hauser	4/21/05

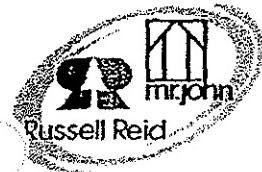
Penrod 000030

Please fax or mail credit application along with the tax exempt certificate, if applicable.  
Terms: NET 10 days

DEFENDANT'S EXHIBIT

14

Binding No. 514



Russell Reid / Mr. John ▪ 200 Smith Street ▪ Keasbey, NJ 08832  
[www.russellreid.com](http://www.russellreid.com) 800.356.4468 [www.mrjohn.com](http://www.mrjohn.com) 800.628.8955  
 Wastewater Management | Temporary Restrooms | Solid Waste Services

#### GENERAL TERMS AND CONDITIONS

1. The Rental/Lessee hereinafter referred to as The Customer acknowledges that it has the care, custody and management of the equipment owned by Mr. John Portable Sanitation Units, Inc. (The Company) and accepts responsibility for the equipment and its contents except when it is being physically handled by employees of The Company. The Customer agrees to indemnify and hold harmless The Company from and against any and all claims for losses or damages to property or life (specifically including but not limited to any claims for damages due to personal injury) resulting from the use or possession of The Company=s equipment.
2. The Company shall not be liable for loss or damage due to delay in delivery or service resulting from any cause beyond The Company=s control including but not limited to compliance with any regulations, orders or instructions of any federal, state, or municipal government nor any department or any agency thereof, acts of God, acts or omissions of The Customer, acts of civil or military authority, fires, strikes, factory shutdowns, or alterations, embargoes, war, riots, delays in transportation, or inability due to causes beyond The Company=s reasonable control to obtain necessary labor, manufacturing facilities, or materials.
3. It is expressly understood and agreed this is an agreement of rental/lease only and The Customer does not acquire title to the equipment.
4. To initiate all orders The Customer must agree to the following payment terms. Confirmation of the Customer=s acceptance of these payment terms will be established by signing below and faxing to The Company at 732-417-0367. No orders will be final until a signed copy of this document is received by The Company. Payment Terms:
5. 50% deposit for all orders placed more than six (6) weeks prior to delivery date. Full payment for all orders placed within six (6) weeks of the delivery date. Full payment for all orders 30 days prior to the delivery date. All orders not paid in full 30 days prior to the delivery date will lose their equipment and service reservation. If The Customer fails to pay in full and cancels the order the 50% deposit will be forfeited as outlined below. All COD payments via check at the time of delivery must be secured by a credit card.
6. The Customer may cancel this order, reduce quantities, revise specifications or extend schedules only by mutual agreements and agrees to pay proper cancellation charges which shall take into account expenses already incurred and commitments made by The Company and shall indemnify The Company against any loss, such loss may or shall not to exceed total contract price.

<u>Canceled Before Event</u>	<u>% of Deposit Returned</u>
120 days	75%
90 days	50%
60 days	25%
30 days	none

7. The Customer agrees to properly protect the equipment hereby leased against damage or loss to same or any part thereof from any cause whatsoever and further agrees to return same to The Company in as good condition as received, excluding reasonable wear and tear. All orders including the Premier or Trailer product require a Certificate of Insurance naming Mr. John, Inc. as additional insured in the amount stated on the temporary restroom service agreement. Mr. John will not release delivery of any Premier or Trailer prior to receiving a faxed copy of the Certificate of Insurance to 732-417-0367.
8. In the event that this agreement is not properly executed by or on behalf of The Customer, the acceptance of the leased equipment by customer when delivered by The Company pursuant to order of The Customer, shall be subject to all the terms and conditions of this agreement.

.

**SMC Exhibit 16**

## Wire Transfer Archive

COMMERCE BK MARLTON

Value Date: 04-26-2005 to 04-26-2005

Page: :

RECV'D  
003/003  
P.002/002  
A/GED

TOP DIR	MED	ROUTER	CREATE DATE & TIME	VAL DATE	TYPE	BANK	DEPT	BRANCH	VER	TEMPLATE	NEG STATUS
PRD	I	050426094837P100	17,700.00	04-26-2005 09:48:37	04-26-2005	1000	136	NIR	74IBR999		0
DIBIT ACCOUNT:		RANK	ACCT TYPE & NUMBER	CUST CODE							
CREDIT ACCOUNT:	136	DDA	21055187	013621095187	RUSSELL REID WASTE HANDLING DIS						0.00
SENDER:	026009593 BK AMER NYC										
ORIGINATOR:	AC 005481007077										
	PERIOD MANAGEMENT GROUP, INC.										
	1 OCEAN DR										
	MIRI BEACH, FL										
	33139-7321										
RECIPIER:	031201360 COMC BK MARLTON										
BENEFICIARY:	AC 002195187										
	MR JOHN/RUSSELL REID CO										

Operations  
856 633 6625

ORIGINATING BANK:

BENEFICIARY BANK:

INSTRUCTING BANK:

INTERMEDIARY BANK:

PRODUCT CODE: CTR  
 SENDER REFERENCE: 2005042600062812  
 TRAD: 2005042600062812  
 QWAD: 200504260187681C00005404260945F101

REFERENCE FOR BENEFICIARY:  
 AS OF DATE & REASON: 12-31-1969  
 REFERENCE IND: 1  
 DISPOSITION:

OBI: DEPOSIT ON TOILETS

FBI:

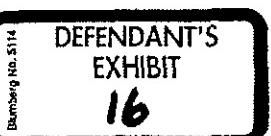
NON-ACCOUNT INFORMATION:

PHONE:

NAME:   
 ADDRESS:   
 CITY:   
 DRIVER'S LICENSE:   
 SSN OR EIN:

STATE: ZIP: STATE OR ISSUE: 

EXPIRATION DATE: 12-31-1969

COMMENTS: 

TOTAL P.002

**SMC Exhibit 51**

September 21, 2005

Michael Register  
Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

Dear Michael Register:

Customer ID: 036599

As of September 21, we have not received your past due payment. Please check your records. Our records indicate that the following invoices and amounts are past due:

Invoice Date	Invoice #	Balance Remaining
09/16/2005	0000631700	\$20,400.00
08/19/2005	0000561886	\$21,754.00
07/22/2005	0000475833	\$21,012.00
06/24/2005	0000398618	\$21,201.00
05/27/2005	0000312744	\$26,085.71
Total Balance		\$110,452.71

If you have already sent your payment, please disregard this notice and accept our thanks for your payment. Please contact me at (732) 692-2474 with any questions.

Sincerely,

Robert Hiss  
Accounts Receivable Manager  
[bhiss@russellreid.com](mailto:bhiss@russellreid.com)

DEFENDANT'S  
EXHIBIT

51



## PLEASE MAIL PAYMENT TO:

Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832

## REMITTANCE COPY-DETACH AND RETURN WITH PAYMENT

CUSTOMER CODE	INVOICE #	AMOUNT PAID
036599	0000312744	

CHARGE MY:  Visa  MasterCard  AMEX  Discover

Cardholder Name

Cardholder Address, City State &amp; Zip Code

Card #

Amount Paid Exp. Date

Signature

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

\$25.00 Returned Check Fee | Terms: Net 10 Days | Make Checks Payable to Mr. John Inc.



Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832  
Phone: (732) 225-2233  
Fax: (732) 417-0367

Customer Number	036599
Invoice Date	5/27/2005
Invoice Number	0000312744
Page	Page 1 of 1

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

Date/Period	Qty	NJC Qty	Description	Rate	Amount
Site 036599-001 - Nikki Beach Bar - 1133 Boardwalk, Atlantic City, NJ					
Account Executive: Lauren Gommel					
5/3/2005			WO# 0000071937		
	1.00	0.00	Delivery Charge Restroom Trailers 7215GP, 7204GP	450.00000	450.00
5/3/2005			WO# 0000071839		
	2.00	0.00	Delivery Charge Units	1,000.00000	2,000.00
05/12/05 - 06/23/05	4.00	0.00	Standard Temporary Restroom w/City Main Connection	950.00000	5,835.71
5/12/2005			WO# 0000078539		
	1.00	0.00	Delivery Charge Units	1,200.00000	1,200.00
05/27/05 - 06/23/05	2.00	0.00	Ambassador 2 ADA	2,300.00000	4,600.00
05/27/05 - 06/23/05	2.00	0.00	Gold Plus Restroom Trailer 7215GP, 7204GP	6,000.00000	12,000.00
				Site Total	26,085.71
				Total Invoice Amount	26,085.71

The continuing escalation in diesel fuel prices require's that we immediately assess a 4.75% Fuel Surcharge for the rental and service of individual units. Thank you for your continued patronage.



## PLEASE MAIL PAYMENT TO:

Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832

## REMITTANCE COPY-DETACH AND RETURN WITH PAYMENT

CUSTOMER CODE	INVOICE #	AMOUNT PAID
036599	0000398618	

CHARGE MY:  Visa  MasterCard  AMEX  Discover

Cardholder Name

Cardholder Address, City State &amp; Zip Code

Card #

Amount Paid Exp. Date

Signature

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

\$25.00 Returned Check Fee | Terms: Net 10 Days | Make Checks Payable to Mr. John Inc.



Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832  
Phone: (732) 225-2233  
Fax: (732) 417-0367

Customer Number	036599
Invoice Date	8/24/2005
Invoice Number	0000398618
Page	Page 1 of 1

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

Date/Period	Qty	N/C Qty	Description	Rate	Amount
Site 036599-001 - Nikki Beach Bar - 1133 Boardwalk, Atlantic City, NJ					
Account Executive: Lauren Gommel 6/2/2005 WO# 0000088843					
	1.00	0.00	Service Surcharge- Sunday/Double Time 7215GP, 7204GP	250.00000	250.00
6/15/2005	WO# 0000094617				
	4.00	0.00	Repair Charge 7215GP, 7204GP	28.00000	112.00
	1.00	0.00	Labor Charge - Regular 7215GP, 7204GP	400.00000	400.00
	2.00	0.00	Replacing 4 Peddals		
06/24/05 - 07/21/05	2.00	0.00	Ambassador 2 ADA	2,300.00000	4,600.00
06/24/05 - 07/21/05	2.00	0.00	Gold Plus Restroom Trailer 7215GP, 7204GP	6,000.00000	12,000.00
06/24/05 - 07/21/05	4.00	0.00	Standard Temporary Restroom w/City Main Connection New Jersey Sales Tax	950.00000	3,800.00
					39.00
				Site Total	21,201.00
				Total Invoice Amount	21,201.00



## PLEASE MAIL PAYMENT TO:

Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832

## REMITTANCE COPY-DETACH AND RETURN WITH PAYMENT

CUSTOMER CODE	INVOICE #	AMOUNT PAID
036599	0000475833	

CHARGE MY:  Visa  MasterCard  AMEX  Discover

Cardholder Name

Cardholder Address, City State &amp; Zip Code

Card #

Amount Paid Exp. Date

Signature

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

\$25.00 Returned Check Fee | Terms: Net 10 Days | Make Checks Payable to Mr. John Inc.



Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832  
Phone: (732) 225-2233  
Fax: (732) 417-0387

Customer Number	036599
Invoice Date	7/22/2005
Invoice Number	0000475833
Page	Page 1 of 1

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

Date/Period	Qty	N/C Qty	Description	Rate	Amount
Site 036599-001 - Nikki Beach Bar - 1133 Boardwalk, Atlantic City, NJ					
Account Executive: Lauren Gommel					
7/3/2005			WO# 0000106067		
	1.00	0.00	Repair Charge 7215GP, 7204GP	400.00000	400.00
	1.00	0.00	Emergency Service Surcharge- Sunday/Double Time 7215GP, 7204GP	200.00000	200.00
07/22/05 - 08/18/05	2.00	0.00	Ambassador 2 ADA	2,300.00000	4,600.00
07/22/05 - 08/18/05	2.00	0.00	Gold Plus Restroom Trailer 7215GP, 7204GP	6,000.00000	12,000.00
07/22/05 - 08/18/05	4.00	0.00	Standard Temporary Restroom w/City Main Connection New Jersey Sales Tax	950.00000 12.00	3,800.00 12.00
				Site Total	21,012.00
				Total Invoice Amount	21,012.00



## PLEASE MAIL PAYMENT TO:

Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832

## REMITTANCE COPY-DETACH AND RETURN WITH PAYMENT

CUSTOMER CODE	INVOICE #	AMOUNT PAID
036599	0000561886	

CHARGE MY:  Visa  MasterCard  AMEX  Discover

Cardholder Name

Cardholder Address, City State &amp; Zip Code

Card #

Amount Paid Exp. Date

Signature

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

\$25.00 Returned Check Fee | Terms: Net 10 Days | Make Checks Payable to Mr. John Inc.



Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832  
Phone: (732) 225-2233  
Fax: (732) 417-0387

Customer Number	036599
Invoice Date	8/19/2005
Invoice Number	0000561886
Page	Page 1 of 1

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

Date/Period	Qty	N/C Qty	Description	Rate	Amount
Site 036599-001 - Nikki Beach Bar - 1133 Boardwalk, Atlantic City, NJ					
Account Executive: Lauren Gommel					
7/21/2005	WO# 0000110638	1.00	Service Surcharge- Sunday/Double Time 7215GP, 7204GP	400.00000	400.00
7/26/2005	WO# 0000114336	1.00	Service Surcharge- Sunday/Double Time 7215GP, 7204GP	500.00000	500.00
7/29/2005	WO# 0000116999	1.00	Repair Charge	400.00000	400.00
08/19/05 - 09/15/05	2.00	0.00	Ambassador 2 ADA	2,300.00000	4,600.00
08/19/05 - 09/15/05	2.00	0.00	Gold Plus Restroom Trailer 7215GP, 7204GP	6,000.00000	12,000.00
08/19/05 - 09/15/05	4.00	0.00	Standard Temporary Restroom w/City Main Connection New Jersey Sales Tax	950.00000	3,800.00
				54.00	
				Site Total	21,754.00
			Total Invoice Amount		21,754.00



## PLEASE MAIL PAYMENT TO:

Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832

## REMITTANCE COPY-DETACH AND RETURN WITH PAYMENT

CUSTOMER CODE	INVOICE #	AMOUNT PAID
036599	0000631700	

CHARGE MY:  Visa  MasterCard  AMEX  Discover

Cardholder Name

Cardholder Address, City State &amp; Zip Code

Card #

Amount Paid Exp. Date

Signature

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

\$25.00 Returned Check Fee | Terms: Net 10 Days | Make Checks Payable to Mr. John Inc.



Mr. John Inc.  
PO Box 130  
Keasbey, NJ 08832  
Phone: (732) 225-2233  
Fax: (732) 417-0367

Customer Number	036599
Invoice Date	9/16/2005
Invoice Number	0000631700
Page	Page 1 of 1

Penrod Management Group, Inc  
1 Ocean Drive  
Miami Beach, FL 33139

Date/Period	Qty	N/C Qty	Description	Rate	Amount
Site 036599-001 - Nikki Beach Bar - 1133 Boardwalk, Atlantic City, NJ					
Account Executive: Lauren Gommel					
09/16/05 - 10/13/05	2.00	0.00	Ambassador 2 ADA	2,300.00000	4,600.00
09/16/05 - 10/13/05	2.00	0.00	Gold Plus Restroom Trailer 7215GP, 7204GP	6,000.00000	12,000.00
09/16/05 - 10/13/05	4.00	0.00	Standard Temporary Restroom w/City Main Connection	950.00000	3,800.00
				Site Total	20,400.00
				Total Invoice Amount	20,400.00

The continuing escalation in diesel fuel prices requires that we immediately adjust our fuel surcharge to 6% for the rental and service of individual units. Thank you for your continued patronage.